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Jacob Green

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When Conditions Go Bad: An Examination of the Problems Inherent in the Conditional Use Permitting System

The purpose of a Conditional Use Permit is to allow proper integration of uses into the community which may only be suitable in specific locations and may have potentially detrimental characteristics if not properly designed, located, and conditioned.¹

INTRODUCTION

Imagine a piece of property in Salt Lake City, Utah.² This property is located within a Neighborhood Commercial zone. This zone “is intended to provide for small scale, low intensity commercial uses that can be located within and serve residential neighborhoods.”³ Within this zone, there are numerous permitted uses such as bed and breakfasts, medical clinics, daycare centers,⁴ museums, offices, urban farms, and recycling collection stations.⁴ Seeing a business opportunity in the community, the property owner decides to open a gas station. However, this is not a permitted use in this zone; it is a conditional use.

The Salt Lake City Code defines a conditional use as “a land use which, because of its unique characteristics or potential impact on the municipality, surrounding neighbors or adjacent land uses, may not be compatible or may be compatible only if certain conditions are required that mitigate or eliminate the negative impacts.”⁵ Deciding to move forward with building a gas station, the property owner applies for a conditional use permit. Under Utah law, a conditional use application “shall be approved if reasonable conditions” are applied to the property that “mitigate the reasonably

1. PROVO, UTAH, CODE § 14.02.040 (2014) *available at* <http://www.codepublishing.com/ut/provo/html/Provo14/Provo140200.html#14.02.040>.

2. The author uses Salt Lake City merely as an example because he is familiar with the zoning laws in Salt Lake City.

3. *Salt Lake City Zoning Districts*, MAPS.SLCGOV, <http://maps.slcgov.com/mws/zoning.htm> (last visited Oct. 2, 2014).

4. SALT LAKE CITY, UTAH, CODE § 21A.33 (2014), *available at* http://www.sterlingcodifiers.com/codebook/index.php?book_id=672 [hereinafter SLC CODE].

5. *Id.* at 21A.54.010(A).

anticipated detrimental effects” of the conditional use.⁶ Unsure what it means to impose a “reasonable condition,” the property owner consults the Salt Lake City Code for guidance and finds the following:

C. Conditions Imposed: The planning commission, or in the case of administrative conditional uses, the planning director or the director’s designee, may impose on a conditional use any conditions necessary to address the foregoing factors which may include, but are not limited to:

1. Conditions on the scope of the use; its character, location, hours and methods of operation, architecture, signage, construction, landscaping, access, loading and parking, sanitation, drainage and utilities, fencing and screening, and setbacks; and

2. Conditions needed to mitigate any natural hazards; assure public safety; address environmental impacts; and mitigate dust, fumes, smoke, odor, noise, vibrations; chemicals, toxins, pathogens, gases, heat, light, and radiation.⁷

Under the Salt Lake City Code, the planning commission can impose conditions on the conditional use permit covering almost any aspect related to the property or its use. Additionally, there are no real limits to the conditions that can be imposed. The planning commission has extremely broad authority to impose conditions, and this broad authority can, and in some cases does, lead to violations of property owners’ rights. Based on these conditions, the property owner in this hypothetical has little idea what might be asked of her if she is granted her permit. Vague standards, like this one, are only one of the myriad problems inherent in conditional use permits.

While conditional use permits provide an important tool to land use boards, they also create a host of problems. These permits are intended to provide flexibility to cities and give them a means to control growth and mitigate negative externalities. However, that same flexibility gives rise to great uncertainty, which can lead to a host of legal issues, not the least of which is violation of constitutional rights. The interplay between these conflicting forces, flexibility and certainty, is at the heart of the conditional permitting scheme. Flexibility is desired, but at the same time shunned.

6. UTAH CODE ANN. § 10-9a-507(2)(a) (LexisNexis 2012).

7. SLC CODE § 21A.54.080(C).

This Comment will examine the interplay between flexibility and certainty and will look at how conditional use permits can, and often do, lead to violations of landowners' rights. Part I of this Comment will begin by providing an overview of conditional use permits by explaining the purpose, features, and function of a conditional use permit. Then Part II will examine some of the common problems faced by property owners seeking conditional use permits. These problems include unconstitutional vagueness, violations of the nondelegation doctrine, unconstitutional exactions, violations of vested rights and nonconforming use statutes, and various other constitutional problems. Part III concludes.

I. WHAT IS A CONDITIONAL USE PERMIT?

Before we can delve into the myriad of problems inherent in the operation of conditional use permits, we must first understand what they are and how they function. This Part will provide a brief overview of the conditional use permitting scheme by explaining what a conditional use permit is, why political subdivisions use conditional permits, how a conditional use permit ordinance works, and what is meant by attaching "reasonable conditions" to a conditional use permit.

A. What Is a Conditional Use Permit and How Does It Differ from Other Land Use Planning Devices?

Within a land use zone there are typically permitted uses, conditional uses, and uses that are not allowed.⁸ Conditional uses fulfill an important role in land use planning. These uses (sometimes termed "special uses") are intended to provide flexibility to municipalities and prevent the negative externalities of those uses.⁹ Without conditional uses, a use that may be beneficial to the character and nature of a zone, but that also produces negative externalities, would either be allowed without restrictions or not allowed under any circumstances. This all-or-nothing approach can cripple a planning commission's ability to provide necessary services

8. See SLC CODE at § 21A.33, for a sample land use table illustrating what uses are permitted, conditional, or not allowed within the commercial zones of Salt Lake City, Utah.

9. See W.E. Shipley, Annotation, *Attack on Validity of Zoning Statute, Ordinance, or Regulation on Ground of Improper Delegation of Authority to Board or Officer*, 58 A.L.R.2d 1083 (1958).

within a particular zone if those services may also impose some negative externalities on that zone. A conditional use permit allows that city to provide the necessary property uses and control the negative impact of that use.

Take a typical residential zone in Portland, Oregon, as an example of the importance of conditional uses. Within a residential zone, we would expect to find primarily single-family dwellings. Therefore, it would come as no surprise to find “household living” is a permitted use within this zone.¹⁰ Furthermore, within this zone you would not expect to find railroad yards, waste disposal facilities, or manufacturing plants. Unsurprisingly, such uses are not permitted in residential zones in Portland.¹¹ However, the people living in a residential zone desire more than just housing within their zone. The people living there will need schools for their children to attend and hospitals for when accidents occur, as well as churches, parks, and other community facilities. These are all examples of conditional uses within Portland residential zones.¹² While these uses are needed within that zone, they are not similar in nature to a house. They create noise and light pollution, increase traffic, and may lead to safety concerns within a residential zone. Thus, allowing them as conditional uses allows the planning authority to provide necessary services, while at the same time ameliorating the negative consequences of these uses. The planning authority can ameliorate these negative externalities by imposing conditions aimed at limiting these negative effects.

Portland’s zoning ordinance explains why conditional uses are necessary. Portland’s ordinance states:

Certain uses are conditional uses instead of being allowed outright, although they may have beneficial effects and serve important public interests. They are subject to the conditional use regulations because they may, but do not necessarily, have significant adverse effects on the environment, overburden public services, change the desired character of an area, or create major nuisances. A review of these uses is necessary due to the potential individual or cumulative impacts they may have on the surrounding area or neighborhood. The conditional use review

10. PORTLAND, OR., CODE § 33.110.120 tbl.110-1 (2014), *available at* <https://www.portlandoregon.gov/bps/article/53295>.

11. *Id.*

12. *Id.*

provides an opportunity to allow the use when there are minimal impacts, to allow the use but impose mitigation measures to address identified concerns, or to deny the use if the concerns cannot be resolved.¹³

Thus, when used properly, conditional use permits provide a great benefit to a community. They allow a community to provide uses that “serve important public interests,” while giving the community the power to reduce the negative effects of that use.¹⁴

Despite the positive benefits from adopting conditional uses within a zoning ordinance, there is often much confusion about how the permits operate. On the surface, conditional use permits seem the same as other zoning devices, such as variances and special exemptions. However, conditional use permits both function and operate differently.

Recently, the Idaho Supreme Court was tasked with enumerating the differences between conditional use permits and other means of providing flexibility within a zoning plan.¹⁵ In *Burns Holdings, LLC v. Teton County*, Burns Holding, LLC sought to build a concrete batch plant near the city of Driggs, Idaho.¹⁶ The Driggs zoning ordinance stated “[a]ny building or structure or portion thereof hereafter erected shall not exceed forty-five (45) feet in height *unless approved by conditional use permit.*”¹⁷ Relying on this language, Burns filed an application for a conditional use permit to erect a structure seventy-five feet high.¹⁸ The city planning and zoning department approved Burns’ application.¹⁹ The application then was sent to the county for approval.²⁰ The county, however, was confused.²¹ It did not know what decision it was supposed to make.²² Additionally, the county was unsure “whether the matter being considered was an appeal from the decision of the city

13. *Id.* at § 33.815.010, *available at* <http://www.portlandoregon.gov/bps/article/53475>.

14. *Id.*

15. *See* *Burns Holdings, LLC v. Teton Cnty. Bd. of Comm’rs*, 272 P.3d 412, 413 (Idaho 2012).

16. *Id.*

17. *Id.* at 414 (quoting DRIGGS, IDAHO, CODE & ORDINANCES ch. 2, § 13(c)).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

planning and zoning department or a decision for the county to make.”²³ Furthermore, the county did not know whether Burns’ application was for a variance or a conditional use permit, even though Burns filed an application for a conditional use permit.²⁴ After much debate, and not really resolving any of its uncertainties, the county denied Burns’ application for a conditional use permit.²⁵

Eventually, the matter found its way before the Idaho Supreme Court, which affirmed the denial of the conditional use permit and, more importantly, clarified the difference between a variance and a conditional use permit.²⁶ Justice Eismann, writing for the court, explained “[a] variance is a means of obtaining a waiver of certain requirements of a zoning ordinance,” such as bulk, height, and placement requirements.²⁷ Additionally, “[a] variance can only be granted ‘upon a showing of undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest.’”²⁸ A conditional use permit, on the other hand, relates to the proposed use of property.²⁹ Such a permit may be granted only if the proposed use is conditionally permitted by the terms of the ordinance, subject to conditions pursuant to the ordinance, and not in conflict with the zoning plan.³⁰

The court continued, stating that a conditional use permit requires the zoning authority “to require specified types of conditions . . . to mitigate the adverse effects that the development and/or operation of the proposed use may have upon other properties or upon the ability of the political subdivisions to provide [necessary] services”³¹ What is more, the Idaho Code provides a non-exhaustive list of the types of conditions that can be attached to a conditional use permit.³² Some of the conditions that may be attached include (1) minimizing adverse impacts on other properties; (2) assuring the property is properly maintained; (3) requiring on- or

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 416.

27. *Id.* (footnote omitted).

28. *Id.* (citation omitted).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

off-site public facilities; and (4) “[r]equiring mitigation of effects of the proposed development upon” schools and other services delivered by a political subdivision.³³

In addition to differences in the purposes of a variance and a conditional use permit, “[t]he nature of the hearing for the issuance of a variance and a [conditional use permit] will also differ.”³⁴ The hearing for a variance will focus on the applicant proving there is “undue hardship because of characteristics of the site and that the variance is not in conflict with the public interest.”³⁵ On the other hand, the hearing for a conditional use permit will generally “focus upon the conditions that should be attached to the permit.”³⁶

Therefore, despite a conditional use permit’s similarities to other zoning devices, such as variances, the conditional use permit stands alone in its important role. The conditional use permit allows a political subdivision to provide needed uses to an area that otherwise would not be allowed in that area. This increased flexibility is a powerful tool in the arsenal of a zoning authority.

B. How the Conditional Use Permitting Process Works

The process of obtaining a conditional use permit is relatively simple. An individual seeking a permit simply applies to the designated authority, and if the application is denied, appeals to the appropriate authority. However, what happens during the application process is not that simple. A recent case before the Supreme Court of South Dakota ably demonstrates the typical process required to obtain a conditional use permit.³⁷ Mark Meier, a farmer, desired to build two hog confinement facilities on his property.³⁸ This use was zoned as a conditional use in the zone where his property was located.³⁹ Meier began his quest to construct the hog confinement facilities by filing an application with the local Board of Adjustments.⁴⁰ After conducting a public hearing, where Meier and the general public were allowed to speak, the Board of

33. IDAHO CODE ANN. § 67-6512(d)(8) (West 2014).

34. *Burns Holdings*, 272 P.3d at 417.

35. *Id.* (quoting IDAHO CODE ANN. § 67-6516).

36. *Id.*

37. *In re Conditional Use Permit Denied to Meier*, 613 N.W.2d 523 (S.D. 2000).

38. *Id.* at 524.

39. *Id.* at 525.

40. *Id.* at 524.

Adjustments took the matter under consideration and voted to deny the conditional use permit.⁴¹ However, the denial of the permit was not the end of the process.⁴² Here, as in most states, the conditional use permitting statute provided a means of appealing the board's decision.⁴³

Following the denial, Meier appealed the decision to the local circuit court.⁴⁴ At the circuit court, "Meier presented numerous witnesses and pieces of documentary evidence" to prove that he complied with the local zoning ordinance.⁴⁵ The court affirmed the denial of Meier's application, and Meier appealed again.⁴⁶ On appeal, the Supreme Court of South Dakota affirmed in part, reversed in part, and remanded because the trial court applied the wrong standard.⁴⁷

The ordinance governing *Meier* requires the following before a conditional use permit is granted: (1) a written application indicating the section of the zoning ordinance under which the conditional use is sought and the grounds for which it is requested; (2) notice of public hearing and the holding of a hearing; (3) the zoning board to make particular findings of fact that it has authority to grant the conditional use permit and that "the granting of the conditional use will not adversely affect the public interest;" (4) additional findings that the conditional use meets certain general conditions relating to traffic, parking, proper disposal of refuse, etc.; and (5) a finding that the proposed use meets the specific criteria set forth in the zoning ordinance relating to that particular conditional use.⁴⁸

This detailed and specific statutory scheme is how a conditional use permitting statute should look and function. The statutory scheme provides a clear process for the applicant to follow. Additionally, the statute provides clear standards the zoning board should apply. The statute lists specific negative effects, which make

41. *Id.*

42. *Id.*

43. *Compare id.* at 524 with SLC CODE § 21A.33.

44. *Meier*, 613 N.W.2d at 524. In other jurisdictions, there are often lengthier appeals processes, which require an appeal to a zoning board or city council before the applicant may resort to judicial assistance. *See, e.g.*, SLC CODE §§ 21A.54.156–21A.54.170.

45. *Meier*, 613 N.W.2d at 524.

46. *Id.*

47. *Id.* at 530.

48. *See id.* at 525–27 (quoting the Aurora County Zoning ordinance governing conditional use permits and "performance standards" for commercial animal feeding operations).

the use merely a conditional use and not a permitted use. This list provides the board with clear directions about what the board should look at when deciding whether to grant or deny the application for a conditional use permit. Even more importantly, it provides the board with a clear idea of the types of conditions the board can properly attach to the conditional use permit if it is granted.⁴⁹

C. “Reasonable Conditions”

So far, our discussion has focused on the purpose of conditional use permits and the process for obtaining one. Some of the key factors in any analysis of a conditional use permit are the conditions attached to an application for a permit that is granted. Conditions are attached to a conditional use permit to ameliorate the negative effects of that use. Many states regulate the imposition of conditions by requiring that any conditions attached to a conditional use permit be “reasonable.” For example, the Utah Code section authorizing the use of conditional use permits states “[a] conditional use shall be approved if *reasonable* conditions are proposed.”⁵⁰ Most states and cities have similar provisions.⁵¹ While most localities require that conditions be “reasonable,” the meaning of that term is typically undefined by the governing statutes and codes.

However, despite a dearth of definitions for the term “reasonable,” the proper definition is readily apparent. A condition is reasonable if it is directly related to the proposed use and is aimed at mitigating the potential detrimental effects of the use. For example, New York courts have held zoning boards can “impose ‘reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property,’ and aimed at minimizing the adverse impact to an area that might result” from the proposed use.⁵² The court in *St. Onge v. Donovan* listed several reasonable

49. In the *Meier* case, however, we did not see this in action because his application was denied.

50. UTAH CODE ANN. § 10-9a-507(2)(a) (West 2005) (emphasis added).

51. See, e.g., RIVERSIDE, CAL., CODE § 19.760.010(B) (2007); KERSEY, COLO., LAND USE CODE § 3.9(D)(3) (2014); LONG LAKE, MINN., CODE § 28(4)(C) (2008); N.Y., TOWN LAW § 274-b(4) (1998); LA GRANDE, OR., LAND DEV. CODE & ORDINANCE 3210 § 8.5.004(E) (2013); CLALLAM COUNTY, WASH., CODE § 33.27.040(2) (2014). This is just a small sampling of the numerous state and city codes allowing “reasonable” conditions to be attached to conditional use permits that are approved by the local zoning board.

52. *St. Onge v. Donovan*, 522 N.E.2d 1019, 1023 (N.Y. 1988) (quoting *Pearson v. Shoemaker*, 202 N.Y.S.2d 779, 780 (Gen. Term 1960)).

conditions.⁵³ The reasonable conditions the court listed would “relate ‘to fences, safety devices, landscaping, screening and access roads . . . outdoor lighting and noises, [] enclosure of buildings [] relating to emission of odors, dust, smoke, refuse matter, vibration noise, and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area.’”⁵⁴ The court reasoned conditions such as those listed “are proper because they relate directly to the use of the land” and because they “are corrective measures designed to protect neighboring properties against the possible adverse effects of that use.”⁵⁵ In addition, the court stated conditions may be improper if the conditions do not seek to ameliorate the negative effects of the land use.⁵⁶

Courts in other jurisdictions have given similar meaning to the phrase “reasonable conditions.” For instance, the Court of Appeals in Washington held “reasonable conditions” are a necessary part of the conditional use permit scheme.⁵⁷ The court stated the zoning board had “inherent authority to impose conditions” on a conditional use permit when the conditions “ensur[e] the use meets the county’s zoning goals as set forth in [the general plan].”⁵⁸ The Commonwealth Court of Pennsylvania similarly held “a reasonable condition must (1) relate to a standard in the applicable zoning ordinance [or state code] and (2) be supported by evidence in the record before the zoning [] board.”⁵⁹ In addition, the Court of Appeals of North Carolina stated “a condition imposed on a conditional use permit is improperly imposed when it is not related to the use of the land.”⁶⁰

A recent case from Missouri also emphasizes that a “reasonable condition” is a condition related to the use of the property.⁶¹ In that

53. *Id.*

54. *Id.* (quoting *Pearson*, 202 N.Y.S.2d at 781).

55. *Id.*

56. *Id.*

57. *See, e.g., Schlottfeldt v. Benton Cnty.*, 292 P.3d 807, 810–11 (Wash. Ct. App. 2013) (citation omitted) (stating that “reasonable conditions may be necessary” to achieve zoning goals).

58. *Id.* at 811.

59. *Whitehall Fiduciary, LLC v. Zoning Hearing Bd.*, 49 A.3d 945, 948 (Pa. Commw. Ct. 2012).

60. *Nw. Prop. Grp. v. Town of Carrboro*, 687 S.E.2d 1, 5 (N.C. Ct. App. 2009) (quoting *Overton v. Camden City*, 574 S.E.2d 150, 153 (N.C. Ct. App. 2002)).

61. *Curry Inv. Co. v. Bd. of Zoning Adjustment*, 399 S.W.3d 106, 107 (Mo. Ct. App. 2013).

case, a property owner sought a conditional use permit to open a pawn shop.⁶² The Board of Zoning Adjustment conditioned approval of the permit on the removal of two nonconforming outdoor advertising signs.⁶³ The court, however, noted that the signs were a valid nonconforming use, and held this condition was unreasonable.⁶⁴ The court reached this conclusion because this condition was unrelated to the conditional use permit.⁶⁵

When viewed together, these cases make it clear that a condition is only reasonable when it relates to the proposed use of the property and the condition serves to further a legitimate zoning interest. Thus, the imposition of conditions enhances a local zoning board's ability to provide flexibility within its jurisdiction. The local board can approve a use that will improve the character of the community while at the same time limiting the negative effects of that use.

II. PROBLEMS INHERENT IN THE CONDITIONAL USE PERMIT SCHEME

Conditional use permits, by their nature, cause problems. They were created to provide flexibility. This flexibility, while it can be beneficial, also generates uncertainty and gives great power to the officials who make the decision to grant or deny a conditional use permit. This is the problem inherent in conditional use permits. While providing great flexibility to local land use boards is laudable, and necessary to provide for effective planning, the flexibility is also the cause of numerous problems.

This Part will address some of the most common problems with conditional use permits. Often, the problem originates in the standards outlined in the governing statutes, but sometimes the problems are the result of the way the conditions apply to a permit. First, this Part will address the problems created by vague standards in the statutes authorizing the issuance of conditional use permits. Second, it will discuss how conditional use permits can run afoul of the nondelegation doctrine. Third, it will examine what happens when a condition imposed on a permit is an exaction. Fourth, this Part will scrutinize situations where conditions violate a property

62. *Id.* at 107.

63. *Id.*

64. *Id.* at 109–10.

65. *Id.*

owner's vested rights, or the owner's rights under a nonconforming use statute. Finally, this Part will examine various other constitutional issues common to conditional use permits.

A. Vague Standards

One of the more common problems with conditional use permitting statutes is vagueness. The Fourteenth Amendment commands that no state shall "deprive any person of life, liberty, or property, without due process of law."⁶⁶ One of the ways a law may be unconstitutionally vague is if the law "authorizes or even encourages arbitrary and discriminatory enforcement."⁶⁷ Thus, statutes "must provide explicit standards for those who apply them" to avoid "resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."⁶⁸

While a vague standard serves a purpose in the conditional use permit context, the standard cannot be so vague that it does not provide certainty to landowners. As noted above, one of the primary purposes of the conditional use permit is to provide flexibility to land use boards. Indeed, this flexibility is a great benefit to political subdivisions, in that it allows for controlled growth and for greater control of potentially problematic uses. This type of flexibility is good. However, when the statutes governing conditional use permits become so vague that they leave almost unbridled decision-making powers with land use boards, then the statutes become problematic.

Several problems result from vague standards in conditional use permitting statutes. First, as noted by the Supreme Court of Wisconsin, vague standards "'open[] up both individual zoning decisions and the zoning ordinance provision itself to constitutional challenges as being arbitrary and capricious.'"⁶⁹ The court also noted that, even if such a challenge does not succeed, "'the uncertainty to landowners and citizens alike created by discretionary and/or standardless zoning review should be avoided.'"⁷⁰ For example, in

66. U.S. CONST. amend. XIV, § 1.

67. *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)).

68. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (footnote omitted).

69. *Town of Rhine v. Bizzell*, 751 N.W.2d 780, 798 (Wis. 2008) (quoting John B. Bredin, *Common Problems with Zoning Ordinances*, AM. PLANNING ASS'N ZONING NEWS, Nov. 2002, at 2).

70. *Id.* (quoting Bredin, *supra* note 69, at 2).

Town of Rhine v. Bizzell, the court was concerned with standards that were “simply not specific enough that one can reasonably say” what it takes to comply with the governing statutes.⁷¹ The court in this case took umbrage with standards for obtaining a conditional use permit that were subject to “significant interpretation.”⁷² These standards contained items such as recognizing the “needs of agriculture” and preserving natural growth.⁷³ Contrast these standards with those mentioned above in the case of farmer Meier who was seeking a permit to build a facility for the housing of hogs.⁷⁴ The standards in that case were much more specific and tailored to Meier’s particular use.⁷⁵ Thus, when the standards for issuing a conditional use permit are too vague, or cannot be tied to a legitimate legislative purpose, the ordinance is likely to be struck down.⁷⁶

Second, such vague standards may become an unconstitutional prior restraint. The United States District Court for the Eastern District of Wisconsin explained:

A zoning ordinance is an unconstitutional prior restraint if it: (1) vests the governmental decision maker with unbridled discretion to determine whether it will issue the permit or license; or (2) fails to place limits on the time within which the governmental decision maker must make the permit or licensing determination.⁷⁷

In this case, a statute requiring conditional use permits for the operation of an adult entertainment business was found to be too vague because it left too much discretion in the hands of the governmental decision maker and had no specific time limits, and was therefore an unconstitutional prior restraint.⁷⁸ The court came to this conclusion because the governing ordinance did not offer the zoning board “guidance respecting the proper considerations in

71. *Bizzell*, 751 N.W.2d at 800.

72. *Id.*

73. *Id.*

74. *In re Conditional Use Permit Denied to Meier*, 613 N.W.2d 523, 524 (S.D. 2000).

75. *Id.*

76. *Id.* at 530.

77. *Green Valley Inv. LLC v. Cnty. of Winnebago*, 790 F. Supp. 2d 947, 959 (E.D. Wis. 2011).

78. *Id.* at 959–60 (“[T]his is ‘[a] scheme that fails to set reasonable time limits on the decisionmaker [and] creates the risk of indefinitely suppressing permissible speech.’”) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990)).

determining whether proposed conditional uses” were appropriate.⁷⁹ In addition, the statute allowed the zoning board to consider “‘any [additional factors] *they deem appropriate*.’”⁸⁰ Accordingly, the court held this “unbridled discretion” in the hands of the zoning board “‘creates the risk of indefinitely suppressing permissible speech,’” and thus constituted an unconstitutional prior restraint.⁸¹

Thus, even though conditional use permits are intended to provide flexibility, and are designed to leave decision making in the hands of local officials, the governing statutes must contain clear standards. When the statutes are vague, as is often the case, the statutes are susceptible to challenges for vagueness and as prior restraints. As the court noted in *Bizzell*, the possibility that a statute might be a prior restraint can adversely affects landowners and can have a negative effect on the growth of an area.

B. Nondelegation Problems with Conditional Use Permits

In addition to vague standards causing problems with due process rights and with unconstitutional prior restraints, standards that are too vague may run afoul of the nondelegation doctrine. This “doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.”⁸² The Constitution states “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”⁸³ Thus, to uphold the “‘integrity . . . of the system of government ordained by the Constitution,’” the Supreme Court has interpreted this clause to mean Congress generally cannot delegate its legislative authority to another branch of government.⁸⁴ This doctrine also limits the extent to which legislatures can delegate authority to agencies.⁸⁵

However, legislative bodies “simply cannot do [their] job absent an ability to delegate power under broad general directives.”⁸⁶ Therefore, even though a legislature “generally cannot” delegate its

79. *Id.* at 959.

80. *Id.* (citation omitted).

81. *Id.* at 960 (quoting *FW/PBS*, 493 U.S. at 227).

82. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

83. U.S. CONST. art. I, § 1.

84. *Mistretta*, 488 U.S. at 371–72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

85. See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201.

86. *Mistretta*, 488 U.S. at 372.

authority, a legislature can legally delegate some authority if the legislature “shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform.”⁸⁷ While the precise meaning of “intelligible principle” has evaded judicial definition,⁸⁸ the Court has provided some guidance on this point. The Court, in *American Power & Light Co. v. SEC*, stated it is “constitutionally sufficient” if the intelligible principle “clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”⁸⁹ Nevertheless, these standards are vague and have led some to wonder if the nondelegation doctrine is enforceable in any measure.⁹⁰

In the context of zoning, it is “clear” that the power to zone “involves legislative functions which cannot be [] delegated under constitutional principles of separation of governmental powers.”⁹¹ It is equally clear that a “zoning plan may properly permit administrators [such as a zoning board] to ‘find facts,’” and to determine, when appropriate standards are given by the legislature, whether variances or exceptions are permissible.⁹² Furthermore, the power to grant conditional use permits is also a delegation of power.⁹³ However, many provisions relating to conditional use permits have been struck down because the zoning authority was left “absolutely unguided” in determining whether to issue such a

87. *Id.* (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

88. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 933–34 (2006) (“Yet while acknowledging the intelligible principle test as the measure of whether a statute violates the nondelegation doctrine, the Court has declined to give any strict definition of an intelligible principle.”) (footnote omitted).

89. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

90. See Garry, *supra* note 88 at 938. See also *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (expressing concern that the intelligible principle doctrine does not serve its purpose in limiting legislative cessions of power); *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) (“What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?”).

91. Shipley, *supra* note 9, at 1086 (footnote omitted).

92. *Id.*

93. *Nassau Children’s House, Inc. v. Bd. of Zoning Appeals*, 430 N.Y.S.2d 683, 686 (App. Div. 1980) (“A special exception permit can be issued only upon fulfillment of the conditions mandated in the delegation of power contained in the zoning ordinance.”).

permit.⁹⁴ Nevertheless, when the delegation of authority to issue conditional use permits “contain[s] sufficient restrictive standards for the guidance of the administrative officials,” the delegation of power has usually been upheld as constitutional.⁹⁵

For example, the Commonwealth Court of Pennsylvania stated “[i]t is well settled” that cities possess only the powers “expressly granted to them by the [legislature].”⁹⁶ In *In re Maibach, LLC*, the court grappled with whether the Board of Commissioner’s “Condition 66,” (out of ninety-eight conditions attached to Maibach’s conditional use permit) was proper.⁹⁷ Guiding the court’s decision were the “express standards” of the zoning ordinance related to the specific conditional use Maibach sought.⁹⁸ In the end, the condition was struck down as an impermissible fee; however, the process of this case is illustrative of how a properly drafted conditional use statute avoids the problem of nondelegation.⁹⁹ Because the legislature provided “express” criteria for the Board of Commissioners to apply, the statute did not impermissibly delegate the legislature’s powers.¹⁰⁰

In another case, a federal district court looked briefly at this issue. In *Schulz v. Milne*, the facts gave rise to a “cognizable claim” of an unconstitutional de facto delegation.¹⁰¹ The court in this case came to its conclusion after examining two Supreme Court cases where the Court found an unconstitutional delegation of power.¹⁰² The delegations of power at issue in those cases detailed “no standard by which the power thus given [was] to be exercised,”¹⁰³ and made the parties “free to withhold consent for selfish reasons or arbitrarily and [to] subject [others] to their will or caprice.”¹⁰⁴ Such

94. Shipley, *supra* note 9, at 1087.

95. *Id.* at 1109 (footnote omitted).

96. *In re Maibach, LLC*, 26 A.3d 1213, 1216 (Pa. Commw. Ct. 2011) (citing *Hydropress Envtl. Servs., Inc. v. Twp. Of Upper Mount Bethel*, 836 A.2d 912 (Pa. 2003)).

97. *Id.* at 1214. In this case, Maibach was seeking a conditional use permit to operate an ethanol production plant. The Board of Commissioners approved the permit, subject to ninety-eight conditions. *Id.* at 1214.

98. *Id.* at 1216.

99. *See id.* at 1217.

100. *Id.*

101. *Schulz v. Milne*, 849 F. Supp. 708, 712 (N.D. Cal. 1994).

102. *Id.* at 711.

103. *Id.* (quoting *Eubank v. City of Richmond*, 226 U.S. 137, 144 (1912)).

104. *Id.* (quoting *Wash. ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928)).

a standardless grant of zoning power the Court said is “repugnant” to the Fourteenth Amendment’s promise of due process.¹⁰⁵ In this case, the delegation challenge was sustained because the power to grant the permit rested in the board personally, without any clear standards from the legislature for the board to apply.¹⁰⁶

Accordingly, when a conditional use permitting statute does not provide clear standards for a zoning board to apply, the statute may constitute an unconstitutional delegation of legislative authority. When no “intelligible standard” is present, as in the *Schulz* case, the process may violate the due process clause as well as the constitutional command against the improper delegation of legislative powers.

C. When Conditions Become Exactions

Even when standards governing conditional use permits are not vague, they can cause problems. One particularly frightening problem is when the conditions attached to a conditional use permit are monetary or real property exactions. An exaction is a condition for development imposed on a piece of property requiring the developer to pay money or give property to mitigate anticipated negative effects of the development. However, as the Court noted in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, sometimes an exaction can be a taking.¹⁰⁷ The same problem can occur when a condition imposed on a conditional use permit is an exaction.

Several cases from California underscore the dangers of imposing exactions as “reasonable conditions” on a conditional use permit. In *Lambert v. City & County of San Francisco*, the California Court of Appeals noted conditions attached to the approval of a permit “must ‘substantially advance legitimate state interests.’”¹⁰⁸ It further noted when a condition attached to such a permit “exact[s] money or real property from landowners,” it presents “an inherent and heightened risk that local government[s] will manipulate the police power to impose” unreasonable conditions unrelated to legitimate state

105. *Id.* (quoting *Seattle Title Trust*, 278 U.S. at 122).

106. *Id.* at 712.

107. *See* *Dolan v. City of Tigard*, 512 U.S. 374, 383–84 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831–32 (1987).

108. *Lambert v. City & Cnty of S.F.*, 67 Cal. Rptr. 2d 562, 571 (Ct. App. 1997) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

interests.¹⁰⁹ Thus, the government entity imposing the exaction on a permit must demonstrate an essential nexus between the exaction and a legitimate state interest.¹¹⁰

In a subsequent case involving an exaction, the California Supreme Court noted exactions imposed on an ad hoc basis are much more troublesome than exactions that are legislatively mandated, such as an exaction included in a statute.¹¹¹ When an exaction is imposed as a condition on a conditional use permit, it is often an ad hoc decision, not a result of a statutory command. Thus, exactions should be subject to heightened scrutiny. The California Supreme Court stated “[a]d hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.”¹¹²

In *In re Maibach, LLC*, mentioned above, “Condition 66” required Maibach to “pay one-half cent . . . for each gallon of ethanol produced” at the proposed ethanol plant.¹¹³ The Board of Commissioners required this fee “to provide emergency response services and to address other issues impacting the general public infrastructures of the Township.”¹¹⁴ This fee would fall within the definition of an exaction. Additionally, on its face, this may seem to “impose [a] reasonable condition[] on the grant of a conditional use [permit].”¹¹⁵ However, a reasonable condition relates to the “specific zoning ordinance at issue.”¹¹⁶ This condition was not reasonable.¹¹⁷

The court reached this conclusion on state law grounds.¹¹⁸ The local ordinances made it illegal for a municipality “to require as a condition for approval of a land development . . . payment of any offsite

109. *Id.* (quoting *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996) (plurality opinion)).

110. *Id.*

111. *San Remo Hotel L.P. v. City & Cnty. of S.F.*, 41 P.3d 87, 105 (Cal. 2002) (requiring a hotel to pay \$567,000 as a condition of approval of their application).

112. *Id.*

113. *In re Maibach, LLC*, 26 A.3d 1213, 1215 (Pa. Commw. Ct. 2011) (citation omitted).

114. *Id.* (citation omitted).

115. *Id.* at 1216 (citation omitted).

116. *Id.* (citation omitted).

117. *Id.* at 1220.

118. *Id.* at 1216.

improvements” unless specifically authorized in the statute.¹¹⁹ Even though there was a clear legislative command that exactions such as this were not to be imposed on conditional use permits, the Board of Commissioners attached an exaction as a condition of granting the permit.¹²⁰ What is more troubling, the board imposed this condition, and phrased it the way it did, because it knew two other businesses had already accepted an illegal exaction such as this one.¹²¹ This case provides a prime example of the situations described by the California Supreme Court, where exactions on conditional use permits need special judicial scrutiny to avoid the problem illustrated by this case.

A case from New Jersey further illustrates the conditional exactions problem.¹²² Despite clear law stating the imposition of a financial condition “must be authorized by statute and implemented by municipal ordinance,” a municipality attached a condition that a developer must pay the city \$4,000 per unit built.¹²³ This law was in place because, in the absence of such standards, “the possibilities for abuse in [] negotiations between an applicant and a regulatory body, no matter how worthy the cause, are unlimited.”¹²⁴ The approval of permits without clear standards would result in permits granted or denied “depending upon the board members’ arbitrary sense of how much an applicant should pay.”¹²⁵

Therefore, when exactions are imposed as a condition on a conditional use permit, these conditions are deserving of special judicial scrutiny. Such conditions may constitute unreasonable conditions, but may escape political control for at least two reasons. First, and most importantly, accepting the condition will often result in the permit being granted. This places great power in the hands of the government entity in charge of granting the permit. In essence, the government entity can hold the property owner hostage. Second, if the property owner is not a sophisticated developer or a wealthy

119. *Id.* at 1217 (citation omitted).

120. *Id.* at 1214.

121. *Id.* at 1218.

122. *Pond Run Watershed Ass’n v. Twp. of Hamilton Zoning Bd. of Adjustment*, 937 A.2d 334 (N.J. Super. Ct. App. Div. 2008).

123. *Id.* at 349 (quoting *Nunziato v. Planning Bd. of Edgewater Borough*, 541 A.2d 1105, 1108 (N.J. Super. Ct. App. Div. 1988)).

124. *Id.* (quoting *Nunziato*, 541 A.2d at 1110).

125. *Id.* (quoting *Nunziato*, 541 A.2d at 1110).

landowner, the property owner may not have the funds or the knowledge to challenge the exactions. Thus, such exactions will evade systematic assessment and escape political controls.

D. Problems with Existing Non-conforming Uses and Vested Rights

Often, planning commissions attach expiration dates as a condition on a conditional use permit. While this may seem like a good idea by providing an opportunity to review the use and ensure it is not adversely affecting the community, it is not. Conditional use permits typically run with the land.¹²⁶ Not only may this condition not be “reasonable” (i.e., not relating to an anticipated negative effect of a proposed conditional use), but this particular condition may also run afoul of nonconforming use statutes and vested rights statutes. For example, under Utah law, property owners have a vested right once they have submitted a land use application complying with applicable ordinances and they have paid the associated fees, absent any compelling, countervailing public interest.¹²⁷ Furthermore, under Utah law, even if the zoning ordinance were to change after the conditional use permit was granted, property owners have the right to continue using the property for the previous permitted use.¹²⁸

A case from California shows some of the problems inherent in attaching an expiration date to a conditional use permit. In California, as in Utah and many other states, receiving and relying on a conditional use permit would grant the permit holder the right to continue use of the property even if the zoning laws change subsequent to the permit being granted.¹²⁹ In *Goat Hill Tavern v. City of Costa Mesa*, the court of appeals affirmed the lower court’s decision that the Goat Hill Tavern had vested rights to continue operations and that its conditional use permit should be renewed.¹³⁰ Goat Hill Tavern had been in continuous operation since 1955, a period of more than thirty years.¹³¹ In 1988, the owner expanded the tavern into adjoining commercial space to add a game room.¹³² After

126. Cohn v. Cnty. Bd. of Supervisors, 135 Cal. App. 2d 180 (Dist. Ct. App. 1955).

127. UTAH CODE ANN. § 10-9a-509 (LexisNexis 2012).

128. *Id.* at § 10-9a-511.

129. Goat Hill Tavern v. City of Costa Mesa, 8 Cal. Rptr. 2d 385, 386 (Ct. App. 1992).

130. *Id.*

131. *Id.*

132. *Id.*

the fact, the owner sought a conditional use permit, which he received with the condition that the permit would expire after six months.¹³³ A year later, after receiving noise complaints, the city discovered the permit had expired and required the tavern to apply for a new permit, which was granted with a three-month expiration period.¹³⁴ After the three-month period, the tavern applied for a new conditional use permit and received it with a new condition limiting the tavern's hours of operation.¹³⁵ Because of the new condition, the tavern filed suit and the district court stayed the enforcement of the new condition.¹³⁶ When this permit expired, the tavern was denied a renewal due to public complaints about noise and trash.¹³⁷ However, these complaints could not be linked to the tavern because there were several other bars in the vicinity and a nearby parking lot that served as a gathering point for homeless people in the area.¹³⁸ When the conditional use permit expired, the city argued the tavern "lost all right to continue in business."¹³⁹ The court stated a renewal request can be properly denied only "if the permittee fails to comply with reasonable terms or conditions expressed in the permit" and if the business would constitute a nuisance.¹⁴⁰

A recent case in the Utah Court of Appeals shows an instance where a challenge similar to the one raised in *Goat Hill* could have been made. In *Stevens v. LaVerkin City*, Stevens had owned and operated an auto repair shop.¹⁴¹ Stevens received a valid conditional use permit in 2000.¹⁴² Later, he acquired a second lot and received a six-month conditional use permit for that lot.¹⁴³ After six months, he obtained a new conditional use permit for the second lot with additional conditions attached.¹⁴⁴ In 2004, the city council decided

133. *Id.*

134. *Id.*

135. *Id.* at 387.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 391 (footnote omitted).

140. *Id.* (quoting *O'Hagen v. Bd. of Zoning Adjustment*, 96 Cal. Rptr. 484, 488 (Cal. Ct. App. 1971)).

141. 183 P.3d 1059, 1062 (Utah Ct. App. 2008) (showing how the "auto repair shop" had more in common with a junkyard than a mechanic's shop).

142. *Id.*

143. *Id.*

144. *Id.*

not to revoke Stevens' original permit, but instead to change it to a temporary six-month permit with additional conditions imposed.¹⁴⁵ Later, in 2005, the city refused to renew both permits.¹⁴⁶ Stevens later filed a "complaint against the City alleging a single cause of action: inverse condemnation."¹⁴⁷ Since Stevens never appealed any of the decisions regarding the conditional use permit and his business license expired, the court did not grant him relief.¹⁴⁸

Some additional facts from *Stevens* highlight the sorts of abuses possible when conditional use permits expire. Stevens was operating a business pursuant to a valid conditional use permit.¹⁴⁹ The facts of the case state "at some point" the city began considering expanding the road that Stevens' first permit was on.¹⁵⁰ Because of the city's consideration of widening the road, the city entered into negotiations with Stevens to purchase his property.¹⁵¹ The negotiations broke down in December 2005.¹⁵² While the negotiations were taking place, the city refused to renew the conditional use permits for both of Stevens' lots.¹⁵³ Even more startling, in January 2006, just a month after negotiations broke down, the city decided not to renew Stevens' business license.¹⁵⁴ While these facts do not conclusively show the city abused its powers in not renewing Stevens' permits and business license, the facts demonstrate the potential abuses requiring renewal of conditional use permits may lead to. A city can use the threat of not renewing a permit to force a landowner to discontinue a valid use. Furthermore, a city can attach additional conditions to the permit that are not in accordance with the zoning ordinances, which may violate the permittee's vested rights.

While the court did not review the city's decisions to modify Stevens' conditional use permits because he did not properly appeal those decisions, the court seemed like it wanted to address this issue.

145. *Id.*

146. *Id.* at 1063.

147. *Id.*

148. *Id.* at 1068.

149. *Id.* at 1062.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1062–63.

154. *Id.* at 1063.

The court pointed out Stevens brought only “a single cause of action.”¹⁵⁵ This seems to imply there are other issues that he could have brought. Because Stevens did not properly appeal the decisions about the permits, the court could not review those decisions. If Stevens had properly appealed the decisions regarding his conditional use permits, the court would have had an opportunity to address this issue.

Thus, as demonstrated by these two cases, it is unlikely that an expiration date attached as a condition to a conditional use permit is a “reasonable” condition. As shown in *Goat Hill*, attaching an expiration date to a conditional use permit can create a host of legal issues. First, the expiration of the permit may violate the permit holder’s vested rights. Once the property owner has received a permit, she has the statutory right in most states to continue that use even if the zoning ordinances change in the future. If there is an expiration date attached to the conditional use permit, and the zoning ordinance changes, the government entity would have grounds to not renew the permit even though the permit holder has a right to continue the use as a nonconforming use. Additionally, when the permit is received, the city’s ability to revoke the permit is limited to situations where the permit holder does not comply with reasonable conditions or there is a compelling public necessity (e.g., the use constitutes a nuisance).¹⁵⁶

Second, the expiration gives the local board the opportunity to attach additional conditions to the permit that could unduly burden the property. In *Goat Hill*, for example, those additional conditions were eventually struck down by the court.¹⁵⁷

Third, the renewal process gives the city greater bargaining power with the permit holder. The city could possibly use its power to force the property holder to accept new conditions or make substantial changes to the property to get the conditional use permit renewed. These possible violations of the permit holder’s rights make imposing expiration dates on conditional use permits a legally hazardous decision.

However, there may be circumstances where an expiration date is a reasonable condition. For example, if the applicant knows the permit will expire, and there is no guarantee the permit will be

155. *Id.*

156. *See Goat Hill Tavern v. City of Costa Mesa*, 8 Cal. Rptr. 2d 385, 391 (Cal. Ct. App. 1992).

157. *Id.* at 392.

renewed, this may get around the vested rights issue. If there is no expectation the use will be allowed following the expiration of the permit, it cannot be said that the permit holder has relied upon the permit to establish a right to continue that use. Additionally, it may be proper to attach an expiration date as part of an effort to inspect the property to ensure the conditions imposed on the permit are being met. If the conditions are not being met, such would likely be valid grounds to revoke the permit and would not violate the owner's vested rights.

In addition to expiration dates causing problems, the extinguishment of a conditional use permit on any other ground could likewise cause problems. Since conditional use permits run with the land, the extinguishment of a right to continue to use the property in the manner previously authorized will also likely result in legal challenges. For example, a subsequent change in zoning laws likely would not extinguish the right to use the property in the formerly permitted manner.

A case from Minnesota illustrates the challenges of extinguishing a conditional use permit. In *White v. City of Elk River*, Lorraine White operated a campground in the city of Elk River.¹⁵⁸ After the campground began operation, the zoning ordinances changed, turning campgrounds into a non-permitted use, then into a conditional use, and eventually removing campgrounds entirely from the zone.¹⁵⁹ During the period when campgrounds were a conditional use, White applied for, and received, a conditional use permit.¹⁶⁰ When the campground later violated the conditions of the permit, the city revoked the permit and stated White was no longer authorized to operate the campground.¹⁶¹ The issue in this case was whether the receipt of the conditional use permit revoked the campground's nonconforming use status. The court held it did not.¹⁶² The court also held there are four ways in which a municipality can terminate an owner's right to continue a nonconforming use: (1) through eminent domain, (2) by operation of law when the use has been discontinued for more than a year, (3) when the use has been destroyed to an extent greater than fifty

158. *White v. City of Elk River*, 840 N.W.2d 43, 46 (Minn. 2013).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 51.

percent, and (4) by judicial determination that the use is a nuisance.¹⁶³ Thus, revoking a conditional use permit does not terminate a property owner's right to continue a nonconforming use.

Therefore, using the passage of time is another troublesome way municipalities apply conditions to conditional use permits. The attachment of expiration dates can lead to violations of the owner's vested rights and nonconforming rights. Furthermore, unless there is notice beforehand, revoking a permit may also be an illegal action by a government entity.

E. Other Constitutional Problems

Besides problems with vagueness and prior restraints, conditions attached to conditional use permits can run afoul of other constitutional rights—especially those guaranteed by the First Amendment. Two cases demonstrate the potential First Amendment problems that can arise with conditional use permits. The first deals with the freedom of speech; the second, with freedom of religion.

In *Barbulean v. City of Newburgh*, a vague statute created an unconstitutional time, place, and manner restriction.¹⁶⁴ Barbulean operated an adult video store.¹⁶⁵ After installing thirteen videotape-viewing booths, he was required to obtain a conditional use permit.¹⁶⁶ When he failed to do so and was subsequently cited, he challenged the constitutionality of that ordinance.¹⁶⁷ The New York court held the statute was facially unconstitutional because there were insufficient standards in the statute for the appeals board to determine whether or not to grant a conditional use permit.¹⁶⁸ The court reasoned that when the articulated standards for granting a permit are vague, “the spectre of censorship may exist just as clearly as where there are no standards at all.”¹⁶⁹ The standards in this case raised this spectre of censorship because the standards included twelve factors, one of which gave the board permission to consider anything it wished.¹⁷⁰ The

163. *Id.* at 52.

164. *Barbulean v. City of Newburgh*, 640 N.Y.S.2d 935, 948–49 (N.Y. App. Div. 1995).

165. *Id.* at 939.

166. *Id.*

167. *Id.*

168. *Id.* at 944.

169. *Id.* at 948 (citing *Bayside Enters., Inc. v. Carson*, 450 F. Supp. 696, 706 (M.D. Fla. 1978)).

170. *Id.*

court concluded this statute was unconstitutionally vague, which, in this case, amounted to an unconstitutional abridgment of Barbulean's First Amendment rights.¹⁷¹

In the second case, the Ninth Circuit Court of Appeals found a conditional use permitting scheme violated provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA").¹⁷² Centro Familiar Cristiano Buenas Nuevas, a Christian church in Yuma, Arizona, purchased a building on Main Street to hold church services in.¹⁷³ However, the church was required to get a conditional use permit to hold services in that building.¹⁷⁴ The zoning code required religious organizations to get a conditional use permit, but allowed other "membership organizations" to operate in that area without a permit.¹⁷⁵ Because the ordinance singled out religious organizations and treated them differently from other, similar organizations, the ordinance violated RLUIPA.¹⁷⁶

While these are just two examples, the constitutional problems raised by improper conditional use permitting practices are numerous. As the Supreme Court noted, "[t]he power of censorship inherent in this type of ordinance reveals its vice."¹⁷⁷ The broad powers given to zoning authorities gives them great power to censor. When standards are vague, that problem is amplified.

III. CONCLUSION

While conditional use permits serve an important function, they also create a host of problems because of their inherent vagueness. Conditional use permits are intended to provide flexibility. However, the intended flexibility often results in overly vague statutes that create too much uncertainty and give land use boards too much discretion—discretion that can often violate the rights of the citizens the zoning ordinance is intended to help. The ordinances can cause problems with vagueness, nondelegation, exactions, vested rights,

171. *Id.* at 948–49.

172. *Centro Familiar Cristiano Buena Nueva v. City of Yuma*, 651 F.3d 1163, 1175 (9th Cir. 2011).

173. *Id.* at 1166.

174. *Id.*

175. *Id.* at 1166–67.

176. *Id.* at 1175.

177. *Saia v. New York*, 334 U.S. 558, 562 (1948).

and First Amendment rights. As the Supreme Court recently noted, “land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.”¹⁷⁸ When a property owner applies for a conditional use permit, she should be able to know with some degree of certainty whether her application will be accepted and what conditions may attach. Sadly, that is often not the case. The result is wasted time, money, and sometimes even a violation of the landowner’s rights.

While there are no easy solutions to this problem, that does not give us the right to ignore this issue. Conditional use permits serve an indispensable purpose in our communities. Without these permits we would be left without schools, grocery stores, or hospitals near our homes. Thus, we must work to make the statutes clearer and less open to interpretation, while at the same time leaving enough discretion in the local zoning commissions to allow the imposition of reasonable conditions to ameliorate the negative impacts of conditional uses.

Because of the flexible nature of conditional use permits, the statutes are purposefully vague. Nevertheless, providing flexibility in zoning cannot override constitutional and other concerns. Finding the proper balance between these competing interests is a task of Gordian proportions. Thus, the problems outlined in this Comment are likely to continue for as long as conditional use permits exist.

Jacob Green *

178. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

* J.D., April 2014, J. Reuben Clark Law School, Brigham Young University.

